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No. 77-1064

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

PHILIP A. McLENNAN and
FRED H. BENDER, PETITIONERS

v.

UNITED STATES OF
AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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UNITED STATES OF AMERICA, Respondent.

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The government's failure to comment on the main questions presented by the Petition is explicable only as an effort to deflect the Court's attention from problems the Solicitor General finds too difficult to confront except by way of a misleading footnote. (Br. Opp. 9, n 3).[1] The government, we resectfully submit, has attempted to depress the primary issues presented by relegating its discussion of these issues to a marginal note (Br. Opp. 9,

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1. The Petition for Writ of Certiorari will be cited as (Pet. __); the Brief in Opposition will be cited as (Br. Opp. __).

n. 3)

I. Judge Choy's opinion for affirmance required the holding that the Copeland Act encompasses the conduct charged to defendants. Upon this determination is based Judge Choy's tolerance of (1) the admission of Burnett's hearsay accusation of violation of the Copeland Act (Pet. 79, n.7); and (2) instructions which allowed the jury (in light of the testimony and closing argument) to believe it was determining guilt under the Copeland Act (Pet. 80-81). Judge Choy rested his vote to affirm upon the holding "that a properly instructed jury could find that defendants' architect-developer agreement did involve a 'kickback' in violation of the Copeland Act and that the trial court, therefore, was in error in dismissing the Copeland Act count." (Pet. 80) Judge Choy's vote determined that the judgment would be upheld.

This holding is now the law in the Ninth Circuit on the breadth of th Copeland Act.

Judge Choy's opinion, the privotal one in the case, squarely raises issues of double jeopardy, the basic interpretation of the Copeland Act, and the trial court's failure to properly instruct the jury.

II. The government relies upon Judge Duniway's characterization of the significance of the Copeland Act evidence. On this point Judge Duniway was sharply disputed by both of his colleagues. Judge Choy (concurring) and Ely (dissenting) agreed that the jury probably considered the Copeland Act accusation in determining to convict:

> "I also cannot agree with Judge Duniway's conclusion that the failure of the trial court to instruct the jury in detail about the dismissal of the Copeland Act count was not error. Clearly, most of the evidence offered by the Government related to this count. The Copeland Act provided the single strongest ground upon which the Government based its contentions that defendant's architect-developer arrangement was illegal and that the failure to disclose it was 'false' or 'misleading'. Moreover, as placed before the jury, the 'that's illegal' portion of Burnett's testimony was the prime piece of evidence of both the illegality of defen-

dants' conduct as well as their knowledge thereof." (J. Choy, Pet. P. 78-79)

"Again, like Judge Choy, I cannot agree with our Brother Duniway's conclusion that the District Court's failure to instruct the jury comprehensively in respect to the dismissal of the Copeland Act (Act) count of the indictment resulted in no more than harmless error. * * * This is especially so because of the prosecutor's references during his closing argument to the Copeland Act (R.T. 970-71), to Burnett's statement in respect to the illegality under the Act of the developer-architect relationship (R.T. 970-71, 973-74, 1063-64), and to illegal kickbacks (R.T. 987-88). Thus, I submit that my Brother Duniway's statement that 'only one' possibly prejudicial remark was made by the prosecutor is inaccurate, as well as quite lame. Even if we assume that only one unfair blow was struck, it was a fatal blow. (J. Ely, Pet. p. 85-86)

Judge Ely argued that to affirm even assuming the dismissal were erroneous, was "contrary to the most basic traditional concept of an orderly trial" (Pet. p. 85-88 n.1) and that "it is entirely conceivable, that the conviction eventually rested upon the Copeland Act charge. (Pet. p. 88-89)

When two judges of the panel identified the issue before them as the propriety of

defendants' de facto conviction of the Copeland Act charge, the government is in no position to disagree.

III. The issues of the case at this stage are clear questions of law. Any contrary suggestion in the opposing Brief can only be explained as a further effort to evade or blur the serious legal problems. Two judges of the Court of Appeals emphatically stated that evidence of Copeland Act violations dominated the trial and the prosecution case.[2] De-

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2. Pet. 78-79 (Choy, J. concurring); Pet. 85-88 (Ely, J. Dissenting). The government concedes in its brief to the Court of Appeals that Burnett's testimony (relating only to Burnett's apprehension of Copeland Act violation) was the prosecution's life line. The United States stated in its Ninth Circuit Brief (at p. 35 and 36) that the testimony was the "only means" to overcome a defense of good faith. In closing argument, the government's allusion to this testimony was frequent: the Solicitor General cites five pages of transcript. (p. 970-975). Further allusion to this testimony appeared in the prosecution's closing at R. 1062-1063 and 1064. It is untrue that (as the government asserts, Opp. Br. 8) Judge Ely found only a "single comment" on the Act. Judge Ely called the assertion that there was but one such improper allusion "inaccurate, as well as quite lame." (Pet. 86).

fense counsel unsuccessfully requested an explanation that the Copeland Act charge was dismissed. Although Judge Ely found that no instruction could have avoided prejudice (Pet. 89), there was not even an attempt to warn the jury that the "Copeland Act" was not charged. The defense request for an explanation is clear on the record. (R. 926-930)[3]

In speaking to the adequacy of the jury instructions, the Solicitor General emphasizes that no criticism is made of any part of the charge given. Like the trial court's charge, the Solicitor General's argument is a misleading half-truth. Because of the emphasis on

3. The defense did not submit the text of a proposed instruction. But in urging an appropriate instruction, defense counsel pointed out its importance because testimony had specifically referred to the Act and that testimony included the hearsay accusation that defendants had violated the Act (R. 927). Furthermore, the trial court firmly stated it would give such an instruction in its own way. (R. 927-928.) Nevertheless, the court gave no instruction which told the jury that petitioners were no longer charged with violation of the so-called "Copeland Act." Petitioners claim the charge was inadequate because of this misleading omission.

the Copeland Act in testimony, and the government's jury argument, the jury required more instruction than it received to enable it to function within the law. Judges Ely and Choy so found. Errors of omission make a charge defective as a whole, even though correct so far as the parts of the charge given.[4]

IV. The only question to which the government devotes significant attention is a question upon which Petitioners <u>concede</u> they do not rely as a basis for the Petition. See footnote 1 of the Petition.[5]

4. For example, a charge may not omit a defense theory supported by evidence. <u>Perez vs. U.S.</u>, 297 F.2d 12 (5th Cir. 1961). All the elements of the offense must be meaningfully explained. <u>United States vs. Clark</u>, 475 F.2d 240 (2nd Cir. 1973); <u>Morris v. United States</u>, 156 F.2d 525 (9th Cir. 1946). A charge which is technically correct but probably misleading is a passive trap for jurors, and is as unacceptable as a plainly false statement of law. In dictum, this Court has rightly observed that even though a jury instruction may be reconcilable with the law, merely "equivocal" guidance is below the standards of fairness required for criminal justice. <u>Bollenbach v. United States</u>, 326 U.S. 607, 613 (1947).

5. Petitioners stated that the hearsay (Cont.)

The apparent effort by the Solicitor General to build a straw man of an issue not traditionally the basis for a grant of certiorari (and expressly not relied upon in the Petition here) would only be aided by an extended refutation of the argument the government makes.[6] That refutation may await the briefing on the merits, should the petition for writ of certiorari be granted.

5. (Cont.) question was raised solely for the sake of completeness, in order to preserve the evidentiary questions for argument should the court grant the petition based on the grounds which the petition discusses; (1) intercircuit conflict in interpreting the Copeland Act; (2) double jeopardy imposed by reexamination of the dismissal; and (3) the propriety of instructions which may have allowed the jury to convict the defendants of a crime no longer part of the indictment. (Pet. 4, fn. 1)

6. It must suffice to say, parenthetically, that the government's argument rests on a misstatement of the record, pointed out in Petitioners' Petition for Rehearing in the Court of Appeals, p. 4 fn. 1. All transfers in issue had already taken place at the time of the 1973 statement which Burnett described. Thus, the only significance of the 1973 statement was the truth of its reference to an earlier statement. Judge Skopil incorporated this finding in his Order, holding that the 1973 statement "occurred after all the transactions (Cont.)

CONCLUSION

The Government has not offered any legitimate argument opposing the petition. The reasons for granting of the writ, as set forth in the Petition, remain compelling. The Court should grant the relief requested.

Respectfully submitted,

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Leslie M. Roberts
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6 (Cont.) that were the subject of this lawsuit." (Ct. 381) There was no issue as to when Burnett first learned the transfers had occurred. [He had testified to this in the ordinary fashion (R. 407)] Further, indirect evidence of this non-controversial fact could not provide a legitimate excuse for introduction of the prejudicial hearsay with which the testimony was loaded.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioners' Reply Brief to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

The Hon. Wade H. McCree, Jr.
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Mr. Sidney I. Lezak
United States Attorney
P. O. Box 71
Portland, Oregon 97207

and depositing the same in the United States mails at Portland, Oregon, on March 28, 1978, and further certify that all parties required to be served have been served.

Leslie M. Roberts
Of Attorneys for Petitioners